ANG THEAM CHOOM

v.

PP

COURT OF APPEAL, KUALA LUMPUR
ABDUL HAMID MOHAMAD JCA
KC VOHRAH JCA
MOHD NOOR AHMAD JCA
[CRIMINAL APPEAL NO: R09-16-2001]
25 OCTOBER 2002

CRIMINAL PROCEDURE: *Judgment - Grounds of judgment - Error in magistrate's written grounds - Inadvertent use of words on burden of proof - Whether a misdirection of law - Whether occasioning a miscarriage of justice - Whether conviction may still be upheld*

CRIMINAL PROCEDURE: *Prosecution - Authority to conduct prosecution - Whether prosecuting officer had authority to prosecute - Authority to conduct prosecution given after issuance and service of summons but before commencement of trial - Whether sufficient - Distinction between 'instituting' and 'conducting' a prosecution - Whether 'conduct' of a prosecution refers to the actual trial - Prosecution of employer for failure to pay EPF of employee - Employees Provident Fund Act 1991, ss. 43(2), 63(1)*

The appellant/employer was charged and convicted under s. 43(2) of the Employees Provident Fund Act 1991 ('the Act') for failing to contribute to the EPF of an employee as required under reg. 3 of the Employees Provident Fund Regulations 1991. The magistrate fined him RM500 pursuant to s. 43(2) of the Act and further ordered him to pay up RM802.00 with interest at 6.7% pa under s. 63(1) of the Act. The High Court upheld the decision and orders of the magistrate and the employer appealed further.

Held:
Per Abdul Hamid Mohamad JCA

[1] The learned judge was right in holding that the inadvertent use of the words "… the **accused** must prove beyond a reasonable doubt …" by the magistrate in his grounds of judgment did not amount to a fatal misdirection of law occasioning a miscarriage of justice. The magistrate had obviously meant to say "… the **prosecution** must prove beyond a

reasonable doubt …". This became evident when in a later part of his judgment the magistrate said "… the accused had failed to raise a reasonable doubt on the prosecution's case …". (pp 541 h-i, 542 a-h & 543 a-c)

[2] There was absolutely no basis to the employer's contention that the order of the magistrate (directing him to pay up RM802 pursuant to s. 63(1) of the Act) was unconstitutional. It was clear that there was no necessity for the prosecution to state that amount in the charge. In any event, the employer had every opportunity to dispute the said amount in court. (pp 543 d-h & 544 a-f)

[3] The employer's submission that the prosecuting officer had no 'authority to conduct the prosecution' against him was misconceived. Even if the authority to conduct the prosecution was given after the summons had been issued and served on the employer, it was, nevertheless, given to the prosecuting officer before the commencement of the trial. This was sufficient. The 'institution' of a criminal proceeding may be distinguished from the 'conduct' of one; the former refers to the preliminary stages whilst the latter refers to the actual 'trial' stage wherein witnesses are called. (pp 544 g-h, 545 a-h & 546 a-b)

[Appeal dismissed.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Perayu/majikan telah dituduh dan disabitkan di bawah s. 43(2) Akta Kumpulan Wang Simpanan Pekerja 1991 ('Akta tersebut') kerana gagal menyumbang kepada KWSP bagi seorang pekerja sepertimana yang dikehendaki di bawah per. 3 Peraturan-Peraturan Kumpulan Wang Simpanan Pekerja 1991. Majistret telah mendenda beliau RM500 selaras dengan s. 43(2) Akta tersebut dan selanjutnya memerintahkan beliau supaya membayar RM802 dengan faedah pada kadar 6.7% setahun di bawah s. 63(1) Akta tersebut. Mahkamah Tinggi telah mempertahankan keputusan dan perintah-perintah majistret dan majikan tersebut telah merayu selanjutnya.

Diputuskan:
Oleh Abdul Hamid Mohamad HMR

[1] Hakim yang bijaksana adalah betul dalam mempertahankan bahawa penggunaan secara tidak sengaja perkataan-perkataan "… the accused must prove beyond a reasonable doubt …" oleh majistret dalam alasan-alasan penghakiman beliau tidak membawa kepada salah-arahan

undang-undang yang memudaratkan yang menyebabkan salahlaksana keadilan. Majistret tersebut telah nyatanya bermaksud untuk menyebut "… the prosecution must prove beyond a reasonable doubt …". Ini menjadi jelas apabila pada bahagian yang terkemudian dalam penghakiman beliau majistret tersebut mengatakan "… tertuduh telah gagal untuk membangkitkan keraguan yang wajar pada kes pendakwaan …".

[2] Adalah tidak terdapat sebarang asas kepada penegasan majikan bahawa perintah majistret tersebut (yang mengarahkan beliau supaya membayar RM802 selaras dengan s. 63(1) Akta tersebut) adalah tidak berpelembagaan. Adalah jelas bahawa tidak terdapat sebarang keperluan bagi pihak pendakwaan untuk menyatakan jumlah itu di dalam pertuduhan tersebut. Dalam sebarang keadaan, majikan tersebut mempunyai setiap peluang untuk mempertikaikan jumlah tersebut di dalam mahkamah.

[3] Hujahan majikan tersebut bahawa pegawai mendakwa tiada 'authority to conduct the prosecution' terhadap beliau adalah disalahtafsirkan. Meskipun jika kuasa untuk mengendalikan pendakwaan telah diberikan selepas saman telah dikeluarkan dan disampaikan ke atas majikan, ianya namun begitu diberikan kepada pegawai yang mendakwa sebelum permulaan perbicarfaan. Ini adalah memadai. "Permulaan" prosiding jenayah boleh dibezakan daripada 'pengendalian' sesuatu prosiding; yang terdahulu merujuk kepada peringkat awal sementara yang terkemudian pula merujuk peringkat 'trial' sebenarnya di mana saksi-saksi dipanggil.

Rayuan ditolak.]

Case(s) referred to:
PP v. Datuk Harun Idris & Ors [1976] 2 MLJ 116 ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 177A, 377, 422(b)
Employees Provident Fund Act 1991, ss. 43(2), 63(1)
Employees Provident Fund Regulations 1991, reg. 3

For the appellant - Mohamad Afza Dahari; M/s Jayadeva & Kamal
For the respondent - Kamarul Hisham Kamaruddin DPP

Reported by Gan Peng Chiang

JUDGMENT

Abdul Hamid Mohamad JCA:

The appellant was charged in the Magistrate's Court for failing to make the EPF contribution of his employee, Norma bt Seman, for the month of February 1991, as required by reg. 3 of the Employees Provident Fund Regulations 1991, thereby committing an offence punishable under s. 43(2) of the Employees Provident Fund Act 1991. On 10 June 1991 he was found guilty, convicted and sentenced to a fine of RM500 in default 14 days imprisonment. He was also ordered to pay a sum of RM802 and interest thereon at 6.7% per annum until full and final payment, under s. 63(1) of the Act. This amount was the amount of the contribution in respect of the same employee that should have been paid but was not paid. He appealed to the High Court which dismissed the appeal. Having obtained leave of this court, he appealed to this court.

(To avoid any confusion, it is important to note that this appeal arises from the Kangar Magistrate's Court Summons Case No. 87-423-97. There was another proceeding against him *vide* Kangar Magistrate's Court No. 87-162-95. That case is not the subject matter of this appeal.)

The Petition of Appeal filed in respect of the appeal to this court contains three grounds:

(1) Yang Arif Hakim, telah terkhilaf dari segi undang-undang apabila memutuskan bahawa tahap beban bukti melampaui keraguan munsabah yang ditetapkan oleh Tuan Majistret terhadap perayu tidak fatal dan bukanlah suatu yang salah arah di dalam undang-undang.

(2) Yang Arif Hakim telah terkhilaf dari segi undang-undang apabila membenarkan perintah yang dibuat di bawah seksyen 63 Akta Kumpulan Wang Simpanan Pekerja walaupun ia bercanggah dengan Perlembagaan Malaysia apabila Perayu tidak diberi peluang untuk membuat pembelaan dan tidak ada di dalam pertuduhan.

(3) Yang Arif Hakim telah terkhilaf dari segi undang-undang apabila memutuskan bahawa perbicaraan adalah sah walaupun ia dijalankan oleh pihak yang bukan dari pihak pendakwaraya dan bercanggah dengan Perlembagaan Malaysia.

First Ground

The first ground concerns the standard of proof. The learned magistrate had said in his grounds of judgment "Orang Kena Saman mesti buktikan melampaui keraguan munasabah". However, he later said, "Orang Kena Saman telah gagal menimbulkan keraguan munasabah atas kes pendakwaan."

The learned judge held that the unfortunate use of the words in the first quoted sentence above was not fatal to the decision of the learned magistrate. He noted that subsequently the learned magistrate "had also quite correctly used the words" in the second quoted sentence above. The learned judge went on to say:

> The wrong choice of words does not constitute a misdirection of law. This issue could be resolved only after taking into consideration the evidence as a whole. (See *Shamugam Munusamy v. PP* [1999] 1 CLJ 783; and *Mohamad Jalani bin Saliman v. PP* [1998] 1 CLJ 123). Incorrect choice of words by the Magistrate does not negate his decision unless there occurred a miscarriage of justice. What is clear from the notes of evidence in the instant case is that the learned Magistrate had directed himself and applied the correct standard of proof at the end of the prosecution case as well as the defence case. The Appellant had said that he had pleaded guilty to a charge in case no. 87-162-95 for non-payment of EPF dues and was ordered to pay the arrears of contributions for period January 1990 to January 1993, and did pay RM4,600 in respect of an employee named Nasir b. Yatim and Norma bt. Seman for January 1993. He was then given a breakdown statement of the respective amounts due before he was charged in case no. 87-162-95. In this case, he was charged for non-contribution of EPF in respect of a worker name Norma bte Seman for January 1991 wages due in February 1991. His only defence was that his above payment of RM4,6000.00 in respect of case 87-162-95 also covered Norma for her January 1991 wages. He laboured under his own misconception which later proved to be unfounded. The Appellant did not inform the EPF authorities that Norma was also employed by them before December 1992 (see exh P4 at page 82 of RR). Thus, it was only after the charge under case no. 87-162-95 was preferred that the authorities, upon further investigations, discovered that Norma was also working in January 1991. Consequently, based upon the complaint statement of Norma, the EPF authorities leveled the charge against the Appellant in the subsequent instant case. The Appellant failed to show any prove that he had settled the EPF contribution for Norma in respect of her January 1991 wages.
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> Clearly, in this matter the magistrate had made a finding of fact (see page 63 to 66 AR) and it is trite that an appellate court is averse to disturb a finding of fact unless such finding is clearly perverse and has led to a miscarriage of justice – which was not the case here. (See *PP v. Wan Razali Kassim* [1970] 2 MLJ 79; *PP v. Munusamy* [1980] 2 MLJ 133 and *Law Tim Wah v. PP* [1978] 1 MLJ 167.)

We agree with the learned judge. It is very clear from the context that the words "Orang Kena Saman" were somehow used in place of the words "Pihak Pendakwaan". The fact that he meant the prosecution is clear from the following sentence when he talked about the "Orang Kena Saman" (meaning the appellant) having failed to raise a reasonable doubt, which as the learned judge said, and we agree, is correct.

As stated by the learned judge the case did not involve complicated facts. The issue is whether the appellant paid his EPF contribution in respect of his employee Norma bte Seman for January 1991 wages due in February 1991 or not. On the facts the learned magistrate was satisfied that he had not. The learned judge was of the view that he should not disturb the findings of facts of the trial magistrate. This court too has no reason to disturb that finding of facts.

Second Ground

The second ground concerns the order made by the learned magistrate ordering the appellant to pay RM802 and interest thereon for arrears of the contributions as provided by s. 63(1) of the Act. Section 63(1), prior to the amendment by the Employees Provident Fund (Amendment) Act 2000 (Act A1080)) reads:

> (1) Notwithstanding the provisions of any other written law, where an employer is guilty of an offence under section 43(2) or section 48(3), the Court before which the employer is found guilty shall order such employer to pay to the Fund the amount of contributions, together with any dividend credited thereon, due and payable to the Board and certified by an officer authorized by the Board to be due from such employer, prior to the date of such finding of guilt.

The argument of the learned counsel appears to be that the order is unconstitutional as the appellant was not given an opportunity to defend himself and the amount was not stated in the charge. His written submission on this point consists of one sentence which consists of the ground stated in the preceding sentence. No argument was put forward. No elaboration was given. No authority was shown to us.

If the learned counsel wants to put forward a proposition of law, he must substantiate it with reasons and authorities. We do not even know on what grounds he made the proposition and on what authorities, if there are. We do not think we should step into his shoes and substantiate his proposition for him.

Be that as it may, it must be remembered that the argument is that the order is unconstitutional. As we understand him, he did not say that s. 63 of the Act was unconstitutional. His two reasons for the argument are, first, the appellant had no opportunity to defend himself and secondly, the amount was not stated in the charge. We shall only confine ourselves to these two narrow grounds.

The point is, the appellant was not charged for a criminal offence for failure to pay the other amount due. That is why the amount was not stated in the charge. The question of "defending" himself did not arise. That section provides for a consequential order for the payment of the amount of contributions due and payable to the Board and certified by an officer authorized by the Board to be due from such employer prior to the date of such finding of guilt. All that the section requires is that the amount must be certified by an officer authorised by the Board. That is to ensure the correctness of the amount. The "Jadual Tunggakan Caruman" was produced as exh P4. The two amounts of RM572 on p. 65 and RM230 on the following page add up to RM802. It was signed by the "Pemeriksa Kanan, KWSP Negeri Perlis". Both amounts are in respect of Norma binti Seman, the employee named in the charge. In fact in a letter dated 17 November 1997 by the same officer to the appellant, the appellant was informed that he had failed to pay the EPF contributions of Norma bt Seman totaling RM802. He was told to pay within 14 days.

Clearly he did not pay as directed. Whatever it is, he cannot claim that he did not know about it, or could not have disputed it, if he was of the view that the amount was wrong. Again he had the opportunity to dispute it when the account was produced in court. He had himself to blame. So this ground too is without merit.

Third Ground

In both his written and oral submissions, the learned counsel for the appellant addressed us only on one point on this issue. He submitted that the authority to conduct the prosecution was only given on 3 June 1998. The trial commenced on 14 August 1998. However, he pointed out to the charge sheet where in the column "Name of Complainant, if any" the name Mohd. Termizi bin L. Karim appears. He submitted that Mohd. Termizi was not a deputy public prosecutor nor a person empowered to prosecute.

This argument can be disposed off immediately. As the wording in the column clearly says, Mohd. Termizi was the complainant, the person who made the complaint to the magistrate. The "pengaduan" (complaint) which is to be found in the record of appeal also shows that he was the complainant, not the prosecuting officer.

The learned counsel for the appellant also pointed out to the column "Date of first appearance" in the charge sheet in which the figures "15/5" were written. He submitted that prosecution had commenced by then but the authority to conduct the prosecution was only given on 3 June 1998. For the purpose of this argument we will assume that "15/5" means "15/5/98". So, it appears that the authority to conduct the prosecution was given after the summons had been issued and served but before the actual trial (meaning, the day the prosecution started calling its witnesses) began. In our view the cases on sanction should be distinguished. Where sanction is required, no prosecution can commence unless it is sanctioned by the public prosecutor. Even then, under the circumstances provided in s. 422(b) of the Criminal Procedure Code, want of sanction is excused. In the case of "consent to prosecute", no prosecution shall be instituted except by or with the consent of the Public Prosecutor – s. 177A of the Criminal Procedure Code. But want of consent is not excused by s. 422 of the Criminal Procedure Code.

In our view, the prosecution cannot be instituted unless the consent or sanction is given (in the case of sanction, subject to s. 422(b)). But, in the present case, it is the authority to conduct the prosecution that is in issue. In our view, so long as it is given, in this case, before the trial began, it should be sufficient. It is at the trial stage that one really "conducts" the prosecution.

Support for this proposition is found in the judgment of Abdoolcader J (as he then was) in *Public Prosecutor v. Datuk Harun bin Idris & Ors* [1976] 2 MLJ 116:

> Pursuing its significance, 'to conduct' means to lead, guide, manage (*In re Bhupalli Malliah* (AIR [1959] And Pra. 477); *Pride of Derby v. British Celanese Ltd.* ([1953] 1 Ch. 149) at p. 167 per Lord Evershed MR). It conveys the idea of leading and guiding, that is to say, the person who conducts the prosecution determines all important questions of policy involved **in the course of the trial** and the attitude to be adopted by the prosecution towards material objections raised or demands made by the accused with respect to the evidence. (emphasis added).

Perhaps we may add that "to institute" a proceeding should be distinguished from "to conduct" a proceeding. Institution is the earlier stage while "conducting" is the later stage, more properly refers to the trial stage.

In this case, as the prosecuting officer was in fact given the authority to conduct the prosecution of the appellant, he had the authority to do so.

As the learned counsel for the appellant had chosen to argue this appeal on this narrow issue, ie, the prosecuting officer had no authority to conduct the prosecution, we see no reason why we should go any further and consider the issue of the constitutionality of s. 377 of the Criminal Procedure Code (as amended by the Criminal Procedure (Amendment) Act 1998 (Act A1015).

On these grounds we dismiss the appeal and confirm the order of the High Court and the Magistrate's Court.